

7/9.08 memo from Hillary hecht

Hello,

There's a new controversy with the Mushroom Express Facility. Please see Craig's email below with background and explanation. I think all of you except Danita have copies of the tribes June 26 letter to the RA. (Danita- A copy is in office mail to you.) I'd like to suggest we meet/telecom next week to clarify issues, any underlying contexts and start a response. Per the Tribe's letter they are requesting a meeting with the RA and say the situation is time sensitive.

Craig - Could you let me know your availability for a .5 hr. call next week? I will coordinate here around your timeframe.

Eileen- I assume time is too short for Elizabeth F., could you suggest another of your staff?

Thank you,

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----- Forwarded by Hillary Hecht/R9/USEPA/US on 07/09/2008 04:51 PM -----

Craig Benson/R9/USEPA/US

07/08/2008 05:06 PM

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Mushroom Express - Tribal
Letter

Hillary faxed me a copy of the 6/26/08 Rincon letter (addressed to RA) this afternoon. The letter addresses our involvement with the property owner of this fire affected parcel to investigate possible areas of contamination, either due to the wildfire event or past practices.

Abbreviated Background

On January 11, 2008 I conducted my first site walk with Marvin Donius, property owner, and Tribal representatives. The walk-through inspection did not reveal any evidence of significant hazmat or justification for initiating an emergency action or immediate justification for a removal action, but there were numerous burned vehicles, buildings and equipment appropriate for recycling (and consistent with the County wide-campaign for residential burned structures and equipment associated with the wildfires). Kristie Orosco, the Tribes Environmental Director understood that there was little if anything substantive EPA removal program could do given absent of hazmat and assessment. Ms. Orosco asked if EPA could help the Tribe with ensuring that samples of potentially contaminated soil areas and groundwater sampling of the destroyed drinking water well were collected. In particular, the Tribe was concerned that the drinking water well may have acted as a conduit for contaminants into the underlying aquifer and concern that there may be contaminated soils in former areas of fuels, vehicle and waste oil storage. I agreed to this support and Ms. Orosco agreed to send me background documents to aid in the development of a sampling and analysis plan. Mr. Donius stated that he had the financial capability and was ready to contract out support once he gets "the issues with the tribe sorted out".

After the site walk, I met with Ms. Orosco, Eric Mendoza, Tribal Environmental, Dick Watenpaugh, Director of Tribal Administration, and Alan Sweeney, Tribal Development and Legal Affairs Director. The meeting was very cordial and the group was enthusiastic about EPA leaning on the property owner to get some basic site assessment (sampling) work completed. Messrs. Watenpaugh and Sweeney described a scenario of concerns over future development of the property and a general unease over not having control on fee lands owned by a non-tribal member. They also stated that the reservation has not perfected any codes, ordinances, infrastructure for enforcement, etc. and that enforcing through the tribe is a good idea but "we don't know how to do it". Mr. Donius later informed me that he had no permits of any kind with the tribe. These references pertained to items such as building and fire codes, local permitting of septic systems, building demolition, etc..

In the days that followed, I tried to find out what if any entity had front-line jurisdiction over the property, particularly as it may relate to local permits, compliance oversight, closure, etc. A brief exploration into this matter (as required by the NCP and necessary to determine any potential ARARs) resulted in nothing but mixed signals, but an overall consensus that issues like these can be tricky and case-by-case. No tribal regulatory authority, rules or procedures were (again in the context of determining ARARs) were offered to me. EPA's jurisdiction over environmental issues was never in question so it was decided to just proceed with the plan. Ms. Orosco never delivered the agreed upon information despite repeated e-mail and phone message requests.

On February 13, 2008 we held a conference call to discuss EPA involvement. Hillary agreed to contact Ms. Orosco to see if he could help in compelling Ms. Orosco to deliver the promised information. Since it was never received, I assume he also had no luck in getting a response from the tribal Environmental Dept.

A draft remediation workplan prepared by Advanced Chemical Safety (ACS) was submitted to me, Ms. Orosco and Dick Watenpaugh, Director of Tribal Administration. The plan was funded by George McGill, a lienholder on the property and former owner. The plan was quite good, but to ensure all Tribal concerns were met, I scheduled a site visit with the ACS Project Manager, Ms. Orosco, and Mr. Donius to go over the plan section by section to ready for a final version. This

site visit took place on February 28, 2008 and was attended by myself, Neil Langerman, ACS, START, Mr. Donius and Mr. Mendoza (in place of Ms. Orosco). Detailed sampling points across the site were agreed to by all, including the drinking water well, possible sump areas, soil areas in proximity to former fuel storage areas including vehicle parking areas, etc. Non-sampling activities including continuing removal of scrap metal, concrete rubble, vehicles and management of physical hazards (i.e., falling walls) were also agreed to.

On March 12, 2008, Mr. Donius informed me that a Conflict-of-Interest issue could not be resolved between himself and Mr. McGill and instead of a revised ACS workplan he had retained a new consultant to prepare a sampling and analysis plan. The new consultant, Marc Boogay and Associates had prepared a Phase I Environmental Site Assessment for Mushroom Express in 2007 (pre-fire). In the period March 25 thru May 12, 2008 several versions of a draft plan were reviewed and commented on before I approved a final version. Most of the comments were quality assurance/analytical method clarifications and did not alter the February 28, 2008 Tribe/EPA agreed upon sampling points. The Rincon Tribe did not provide any other verbal or written comment to any version.

Field implementation occurred on June 14, 2008. EPA is currently awaiting the full data set.

Comments to Rincon Letter dated June 16, 2008

It's difficult to understand how our effort to date could result in such a harsh assessment. I understand that there is bad blood between the Tribe and the Mushroom Express owner and it has been a sore point for the Tribe for many years. EPA's efforts in successfully communicating with and getting cooperation from the Tribal Environmental Department on this issue has been difficult at best. Dozens of calls, messages and e-mails have been ignored and promised information and documents have never been received. Interestingly, on both occasions that I have been on-site with them, it has been very pleasant with an overall spirit of cooperation.

POLREP #3, which is repeatedly cited in the letter, was obviously delivered to Bo Mazzetti with little or no explanation as to its point/purpose. The POLREP is distributed only to those regulatory agencies involved (and certainly not to Marvin Donius) with this assessment initiative and acts simply to update on current actions and issues, including issues that may require action by agencies other than EPA. Information contained in the Key Issues" section (which appears to be a source of much of the angst) is factual representation of the jurisdiction issues I encountered and clearly makes no judgement as to who has jurisdiction, only that the matter for this site is not clear to the players engaged in this matter. It does not affect EPA's ability to support the Tribe, as initially promised, with helping to generate a data set that will help answer many of the Tribes long-standing questions regarding potential soil/groundwater contamination.

I don't know why there is a reluctance for the Tribal Environmental Department to communicate with the Tribal Council to avoid this type of confusion. I have never been invited to discuss the matter with the Council. To suggest that we are not honoring a consultation policy, undermining Tribal sovereignty and not being communicative is in a word shameful. Nevertheless, I do understand that the parcel is a very sensitive issue with Rincon and will not simply go away with our assessment (contamination revealed or otherwise). It's a certainty that other agencies will need to be involved and/or the "Tribal law" will need to reveal itself as this parcel undergoes private sale and re-development.

It should be noted that we (EPA) are not engaged in CERCLA response at Mushroom Express, nor is there any environmental cleanup plan associated with the Site. Clearly, that can change if the data set reveals an environmental contamination issue - but we are not at that point yet. At this time, we are fulfilling our promise to the Tribe to help usher through a quality data set (probably for the first time) that can be used for future decision-making.